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# In the Supreme Court of the United States

OCTOBER TERM, 1976

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**No. 76-495**

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**KAKE-TV AND RADIO, INC.,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA AND FEDERAL  
COMMUNICATIONS COMMISSION,**

*Respondents,*

**AIRCAPITAL CABLEVISION, INC. AND THE  
CITY OF WICHITA, KANSAS,**

*Intervenors.*

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## **BRIEF OF INTERVENOR, AIRCAPITAL CABLE- VISION, INC. IN OPPOSITION TO PETITION FOR CERTIORARI**

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**OPINIONS BELOW**

The opinion of the Court of Appeals is reported in 537 F.2d 1121 (10 Cir.), and that of the Federal Communications Commission is reported in 54 F.C.C.2d 173.

### QUESTION PRESENTED

The question presented is more accurately stated as follows:

Where a cable television franchise contract, adopted by a City after extensive public hearings, is valid on its face, and complies with applicable federal regulations, must the Federal Communications Commission then adjudicate the validity of the franchise contract under local state law when requested by one whose interest is insufficient to give it standing to sue in state courts, particularly when the alleged state law issue is frivolous?

### STATEMENT OF THE CASE

On February 4, 1969, the City of Wichita, Kansas, awarded a non-exclusive cable television franchise, identified as Ordinance No. 30-413, to AirCapital Cablevision, Inc. The award was preceded by extended public hearings, and competing applications from three other companies. (R. 122). (Petitioner was *not* an applicant.) AirCapital's franchise incorporated by reference, as part of its terms, the provisions contained in an earlier general ordinance, No. 28-882. In view of ensuing legal developments, AirCapital's 1969 franchise was amended on October 3, 1972. (R. 23, 38, 133). AirCapital then applied to the Federal Communications Commission for a Certificate of Compliance.

After the 1969 franchise to AirCapital, none of the competing applicants contested the award in any forum, nor did any of the applicants object to issuance by the FCC of a certificate of compliance to AirCapital. Only petitioner, a television station in Wichita, Kansas, instituted

proceedings in state court attacking the validity of AirCapital's franchise, and objected before the FCC. After the Kansas Supreme Court later held that KAKE lacked standing to litigate the validity of AirCapital's franchise (213 Kan. 537, 516 P.2d 929), KAKE asked the FCC to adjudicate the validity of the franchise contract under the local law of Kansas.

Among the theories advanced by KAKE was the assertion that other litigation between other parties, which ultimately upheld the right of cities in Kansas to grant CATV franchises, somehow invalidated AirCapital's franchise. This precariously structured argument was based on two Kansas Supreme Court decisions made in successive appeals in the same action, *Community Antenna TV of Wichita, Inc. v. City of Wichita*, 205 Kan. 537, 471 P.2d 360 (1970), second appeal, 209 Kan. 191, 495 P.2d 939 (1972). (R. 199-215). In the first *Community* appeal, the state district court had upheld the validity of Wichita's general franchise ordinance, No. 28-882, except for two severable sections; but the Kansas Supreme Court held it entirely invalid on the ground that CATV was not "affected with a public interest". In the second *Community* appeal, the Kansas Supreme Court reversed itself and found that the state district court was right the first time in upholding the right of Wichita to enact its general franchise ordinance, No. 28-882, except for the two severable sections.

AirCapital was not a party to that litigation, and its franchise ordinance was not in issue.

After the first *Community* decision in 1970, the City decided, for procedural reasons, to repeal its general ordinance, No. 28-882, in preparation for enacting a revised general ordinance. But it did not attempt to repeal AirCapital's franchise. Among the terms of this franchise-contract were provisions also found in ordinance No. 28-



882. These were the provisions upheld as valid in the second *Community* appeal decision in 1972.

KAKE-TV also contended that AirCapital was awarded its franchise because it was the highest bidder. (R. 206). Its claim has grown bolder in this Court, wherein its petition erroneously states:

"In two successive opinions, the Kansas State Supreme Court itself held that the award of a franchise to AirCapital contravened the Kansas State Constitution because the selection process was predicated solely upon a grant to the highest bidder." (Petition, p. 16).

Although the petition fails to cite cases supporting that statement, the reference is to the two *Community* appeals to which AirCapital was not a party, and in which AirCapital's franchise was neither involved nor a part of the Record. The *Community* opinions merely contain casual statements that the City's franchise award was made to the highest bidder, based entirely on an erroneous recitation in *Community*'s oral argument in the Kansas Supreme Court. (205 Kan. at p. 539, 471 P.2d at 362—"It was stated by plaintiff in oral argument . . .").

The Record in this case establishes without dispute that an independent consulting firm, in analyzing the four bids, advised the City that, *while AirCapital's bid was not the highest bid*, it was "best so far as the public interest and citizens of this city" are concerned. (R. 171; 122).<sup>1</sup> Significantly, a letter to the FCC from the same counsel representing *Community* in Kansas appeals I and II, did not even suggest that AirCapital had been the high bidder. (R. 186).

1. The state court record on appeal in KAKE's action against AirCapital was filed with the FCC. Pages 73-86 of that record contains an exhaustive analysis of the bids. At least one bid was higher than AirCapital's.

It is not true, as petitioner asserts, that the Kansas Supreme Court "referred the question of the validity and effective date of the most recent franchise to the Federal Communications Commission." (Petition, p. 4). After holding that KAKE had no standing to maintain the action against AirCapital, 213 Kan. at 546, 516 P.2d at 935, the court referred to the oral arguments before it which had mentioned the pending FCC proceedings, and stated: "... we are satisfied that KAKE's complaints will be well and fully aired at the hearing and will be given due attention." The statement was nothing more than an indication of its confidence that federal regulations would be properly applied by the federal agency, a confidence which was ultimately justified by the careful consideration given by the FCC to the contentions before it.

The Commission, in granting AirCapital a certificate of compliance, rejected KAKE's claims that AirCapital's 1969 franchise did not comply with the provisions of 47 C.F.R. Sec. 76.31. The franchise complied with all provisions of that rule except the franchise fee limitation. Commission "grandfather" rules and precedent permitted such deviations for franchises issued before the new rules became effective, so long as the franchise was amended to reduce the fee to the prescribed limit by March 31, 1977. Both the City and AirCapital had already agreed to this requirement. (R. 236-243).

In a complete and well-considered opinion based upon an extensive record including submissions by all parties, the FCC rejected KAKE's contentions that AirCapital's 1969 franchise was not valid, and its contention that the franchise was granted to the highest bidder:

"At the outset we wish to emphasize that our stated position is to avoid becoming embroiled in the interpretation of state and local laws. However, we

do not believe we should 'freeze' cable development where a local dispute over the operative date of a franchise is unresolved. We are persuaded that the franchise issued AirCapital on February 4, 1969, is valid." (R. 239).

The Court of Appeals approved the careful consideration given by the Commission to the issues before it, and affirmed the Commission decision. It gave short shrift to the specious and unfounded contentions made by KAKE:

"KAKE argues that the fee to the City provided in the franchise was too high to permit substantial compliance. This, however, we view to be a matter within the discretion of the Commission. The record shows that the interested parties planned a downward revision, and also a review in 1977. We also find no merit in the crossownership issue advanced by those contesting the application, nor of the 'highest bidder' objection." (537 F.2d at 1122-1123).

### ARGUMENT

#### **The Federal Communications Commission Properly Granted AirCapital a Certificate of Compliance for Cable Television Operations Based Upon a Franchise Ordinance Duly Adopted by the City After Extensive Public Hearings.**

The Petition for Certiorari should be denied for several reasons.

First, the Court of Appeals properly held that, once the FCC exercised its duty of testing the franchise provisions against the requirements of federal law, the Commis-

sion could not be turned into a judicial forum for litigation of local common law questions involving validity of a local franchise. The Court of Appeals' decision is not in conflict with the decision of any other court in the nation, but is rather consistent with this Court's decisions.

Second, petitioner did not raise before the FCC nor does it raise in this Court any substantial issue of state law which it contends should have been decided by the FCC.

#### **1. The Court of Appeals Properly Held That, Once the FCC Exercised Its Duty of Determining Whether the Franchise Complied With Federal Regulations, the FCC Could Not Be Turned Into a Common Law Court to Litigate Local Law.**

It is settled that the Commission's policy of leaving the grant of CATV franchises to local government in the first instance, subject to compliance with federal regulations,<sup>2</sup> is lawful and proper. *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (3 judge court, D. Nev.), affirmed without opinion, 396 U.S. 556 (1970).

Federal requirements concerning CATV franchises are listed in 47 C.F.R. 76.31. (A. 19a). KAKE fails to point out any provision in the AirCapital 1969 franchise, as amended, which is inconsistent with the requirements there listed.

Apparently, KAKE contends that the AirCapital 1969 franchise is invalid under state law because AirCapital was the highest bidder. Thus, KAKE would have the Commission go beyond its prescribed role of applying and

2. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L.Ed.2d 100 (1968).



enforcing federal law, to that of adjudicating local state law questions from the fifty states, in situations wherein direct competitors or others having standing to sue in state courts chose not to contest the validity of a franchise in local courts.

It is, of course, elementary that a CATV franchise, duly accepted by the franchisee, is a contract whose validity is governed by state law. *McQuillin, Municipal Corporations*, § 21.16; *City of Liberal v. Teleprompter Cable Service, Inc.*, 218 Kan. 289, 544 P.2d 330 (1975). Since 1969, the City of Wichita and AirCapital, therefore, have been parties to a contract which both recognize as binding. Its validity has not been challenged in the Kansas courts by any of the competing applicants, nor by anyone with sufficient legal interest to give it standing to sue. The franchise is valid on its face.

Yet, KAKE would have the Commission require the parties to litigate the validity of the franchise under state law, even where, as here, one party to the contract, the City of Wichita, was neither an intervenor nor a party. If KAKE's contention were ever to become law, it would require every federal and state administrative agency having responsibility for regulation of contracts in various publicly affected areas to adjudicate the validity of each contract it regulated. In those instances, the administrative agencies would, on request, be transformed into common law courts. The result is so contrary to settled notions of administrative and judicial power, so unworkable, and so unnecessary, that KAKE's contention cannot be taken seriously.

The Court of Appeals was manifestly correct in holding that "It is not the function of the F.C.C. to provide a forum to litigate such an issue, and furthermore, the Commission is not a tribunal equipped to do so. See

*Eagle Broadcasting Co. v. FCC*, 169 U.S. App. D.C. 16, 514 F.2d 852, and *Committee v. FCC*, 537 F.2d at 1123 (D.C. Cir.)."

KAKE claims a "conceptual conflict" with the decision in *Teleprompter Cable Systems, Inc. v. FCC*, No. 1582, ..... F.2d ..... (D.C. Cir., Aug. 26, 1976). The latter decision merely indicated that the due process requirement of 47 C.F.R. § 76.31 might permit the FCC to deny a certificate of compliance when the local franchise was obtained by corrupt practices. The due process requirement is one of federal law, as contrasted with the instant case in which KAKE seeks a determination of state law.

There is not the slightest evidence or claim that AirCapital received its franchise by corrupt practices. There was no violation of the federal due process requirement. The Commission's finding that the franchise complied with federal requirements constitutes a finding that the due process requirement itself was met. The ample evidence of spirited public hearings, competitive proposals, and in-depth study of those proposals, before the franchise was awarded, supports the Commission decision. The suggestion that claimed invalidity of a franchise contract under local law violates the federal due process requirement is too specious to require a response.

The decision below is in accord with the prior decision of this Court in *Regents of Georgia v. Carroll*, 338 U.S.

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3. The cases cited by KAKE for the proposition that the FCC has considered state law questions previously (Petition, p. 14), do not support the statement, and are clearly distinguishable. They do not involve the question here presented. Rather, the Commission has consistently followed the policy which it applied in this case. *General Communications and Entertainment Co., Inc.*, 41 F.C.C.2d 501, recon. denied, 45 F.C.C.2d 309 (1973); *Paxton Community Antenna System, Inc.*, 38 F.C.C.2d 904 (1972); *Cablevision Service, Inc.*, 30 P & F Radio Regulation 2d 1153, 1154 (1974); *Aberdeen Cable TV Service, Inc.*, 20 F.C.C.2d 475 (1969), recon. denied, 22 F.C.C.2d 239 (1970).

586, 94 L.Ed. 363 (1950). After discussing principles of administrative law as related to contracts whose validity is governed by state law, it was held:

" . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." (338 U.S. at 602, 94 L.Ed. at 375-376).

By the same token, the Commission has no authority to determine the validity of the franchise contract between a CATV applicant, and the City of Wichita. Its authority is limited to the application of federal law to the terms of the existing franchise.

It is apparent, therefore, that the Commission could not have adjudicated the validity of the franchise under state law. No ruling it might have made on that issue, which was beyond its authority, could have been binding on state courts in Kansas. *Regents of Georgia v. Carroll, supra*.

This was, indeed, the position initially taken by petitioner before the FCC, when it stated:

" . . . There is absolutely no question that the validity of AirCapital's franchise under the Kansas statutes and Constitution is a purely local issue. This is not a case in which the non-communications questions give rise to or is the basis of larger questions within the ambit of the Commission's jurisdiction under the Communications Act. . . . Rather, in this case, the issue, is a matter of purely local concern determinable solely by reference to state law and state precedent." (R. 71).

Thus, there exists no legal vacuum of any sort as a result of the Commission's consistent position on this issue.

The lack of a state court ruling on the validity of AirCapital's franchise results only from the fact that those parties who had standing to challenge its validity chose not to do so. Their decision not to do so very likely resulted from their own belief that it was valid. Whatever the reason, it remains clear that the Commission acted properly in refusing to adjudicate issues of local law.

## **2. Petitioner Fails to Raise Any Substantial Issue of State Law.**

As noted, KAKE was not one of the four applicants for a CATV franchise in the City of Wichita, Kansas, and is apparently not interested in obtaining the benefits of cable television in its own telecasting area. Thus, after failing in its state court effort attacking AirCapital's franchise, KAKE shifted its efforts to the FCC compliance proceeding. KAKE there made several contentions, not one of which it supported with any substantive fact, and all of which were without merit as demonstrated by undisputed facts of record.

KAKE contended before the FCC that the City awarded AirCapital's franchise on the basis of being the highest bidder in violation of state law; that the franchise was enacted without proper notice or hearings, and without consideration of the legal, technical and other qualifications of the applicant.

It appeared without dispute that AirCapital's 1969 franchise was awarded only after spirited public hearings over a period of time, and that all four applicants' CATV proposals were the subject of serious studies, including analyses by independent consultants.

Thus, in this Court, KAKE confines its claim concerning state law to the contention that the FCC should have



made a specific finding as to whether AirCapital's franchise was invalid on the ground that it was awarded on the basis of AirCapital being the highest bidder. In doing so, KAKE fails to point to a single fact in the Record below remotely supporting its claim; and fails to refer this Court to the facts in the Record which conclusively establish that AirCapital's franchise was not awarded on the basis of being the highest bidder.

Rather, KAKE relies only on an inadvertent, erroneous statement by the Kansas Supreme Court in litigation to which AirCapital was not a party, and in which its franchise was not in issue, as we demonstrated in our Statement of the Case, *supra*.

For these reasons, the alleged local law "high bidder" contention was frivolous and without substance. As the Court of Appeals stated, "We also find no merit in . . . the 'highest bidder' objection." (537 F.2d at 1123).

Insofar as the FCC considered the amount of AirCapital's franchise fee, and its regulations in regard thereto, the FCC properly applied its rules by holding that the franchise fee must be reduced to 3% by March 31, 1977, and correctly observed that the City and AirCapital had already formally agreed to that reduction. (R. 240).

The Petition for Certiorari, therefore, does not raise a substantial issue of state law, even assuming for this purpose that federal agencies could be transformed into common law courts. The petition should, for this additional reason, be denied.

## CONCLUSION

The issue presented by petitioner is neither novel nor substantial. Petitioner would have this Court overturn the settled law governing regulatory powers of administrative agencies by requiring them to decide the validity of local franchise contracts under the laws of our fifty states.

Petitioner has failed to submit any rational ground or legal basis for requiring the FCC to adjudicate the validity of AirCapital's franchise. And petitioner's claim of invalidity under state law itself lacks any substance because the Record demonstrates that AirCapital was not awarded its franchise on the basis of being the highest bidder. Hence, it would be a useless formality to consider the question presented in the Petition for Certiorari.

The Petition should be denied.

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